IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re CHARLES LLOYD GOLDEN and MARTHA DIANE GOLDEN, Debtors.	No. 96-22904 Chapter 13
CHARLES LLOYD GOLDEN and MARTHA DIANE GOLDEN, Plaintiffs, *vs*. FIRST UNION MORTGAGE CORPORATION, Defendant.	Adv. Pro. No. 99-2021

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is an action for damages for an alleged willful violation of the automatic stay by First Union Mortgage Corporation ("First Union") pursuant to 11 U.S.C. § 362(h). In the motion for summary judgment or judgment on the pleadings which is presently before the court, the debtors, Charles and Martha Golden, request that summary judgment on the issue of liability be granted in their favor as it is undisputed that First Union had knowledge of the debtors' bankruptcy case at the time it commenced certain collection efforts against the debtors. First Union responds that summary judgment is not appropriate because there is a dispute of fact as to whether its actions were in fact "willful" or simply inadvertent. Because this court concludes that willful within the context of § 362(h) refers to acts taken with knowledge of the case and that there is no bad faith or maliciousness requirement, the debtors' motion for summary judgment as to liability will be granted. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(O).

I.

The debtors commenced the chapter 13 case underlying this adversary proceeding on December 18, 1996. First Union was listed as a creditor, has filed a proof of claim, and is being paid a monthly maintenance payment through the debtors' plan

confirmed February 12, 1997. On May 15, 1998, the debtors filed their first adversary proceeding against First Union alleging various stay violations. That adversary proceeding, no. 98-2087, along with a contested matter regarding an objection by the debtors to First Union's arrearage claim, was settled pursuant to an agreed order entered on January 14, 1999. In that order, First Union, without admitting liability as to any stay violations, agreed to amend its arrearage claim to zero, pay the debtors $750.00 in damages resulting from the arrearage claim, and pay debtors' counsel $2,250.00 in fees.

The alleged stay violations which are at issue in the present proceeding took place after the settlement of adversary proceeding no. 98-2087. On or about March 7, 1999, the debtors received a collection notice from First Union stating, *inter alia*, that the loan from First Union to the debtors "has been declared in default for failure to pay installments as required," demanding "payment of all sums necessary to bring such loan current," and threatening to "accelerate the maturity of the Note" and schedule a "foreclosure sale." Approximately one week later, a representative from First Union's collection department telephoned the debtors at their home. The debtors allege that First Union's representative told them in this telephone conversation that "their home had been foreclosed and

they were selling the farm." The debtors also received an Annual Escrow Account Disclosure Statement from First Union advising them that their mortgage payment had increased because of hazard insurance purchased by First Union.

This adversary proceeding was commenced by the debtors on April 20, 1999, and the motion for summary judgment or for judgment on the pleadings was filed by the debtors on October 12, 1999. The debtors assert in the motion that they are entitled to judgment on the pleadings because it is undisputed that First Union was aware of the debtors' bankruptcy case and that it conducted the collection efforts in question. The debtors observe that First Union's knowledge of the bankruptcy case is established by the previous adversary proceeding between the parties and that the collection efforts are admitted by First Union in its answer to the present complaint.

Although First Union does admit in its answer that it sent the correspondence to the debtors and that its collection department telephoned the debtors on March 15, 1999, it has filed a response in opposition to the debtors' summary judgment motion, asserting that summary judgment is not appropriate because its collection attempts were due to inadvertence rather than callous or willful disregard of the automatic stay. In support of this assertion, First Union has submitted the

affidavit of Selina L. Schroer, a legal associate and assistant secretary for First Union. Ms. Schroer states in her affidavit that based on her personal knowledge of First Union's computer system and its file notes relating to the debtors' account, the collection efforts were due to a "miscommunication between the litigation and bankruptcy areas of [First Union's] legal department." Upon receipt of the agreed order settling and dismissing the previous adversary proceeding, First Union "mistakenly thought the bankruptcy case as well as the adversary proceeding had been dismissed. Based on this misinformation, the Bank proceeded to remove the bankruptcy code from the Golden's account on its computer system and it was removed from the bankruptcy area of the legal department" which resulted in the subsequent collection efforts. First Union argues that Ms. Schroer's affidavit creates a genuine issue of material fact as to whether First Union's violation of the automatic stay was "willful" thus precluding summary judgment.

II.

Section 362(a) of the Bankruptcy Code operates to stay, *inter alia*, "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." *See* 11 U.S.C. § 362(a)(6). Section

362(h) states that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

First Union maintains that in order for the debtors to recover under § 362(h), they must establish that First Union "acted intentionally with maliciousness; in bad faith; or deliberately carried out the prohibited act of violating the automatic stay." There is some support for this position. In *Gurley*, Judge Latta of the Western District of Tennessee held that "[a] willful violation requires proof that the creditor demonstrated 'egregious, intentional misconduct.'" *Gurley v. Mills (In re Gurley)*, 222 B.R. 124, 145 (Bankr. W.D. Tenn. 1998)(quoting *Kolberg v. Agricredit Acceptance Corp. (In re Kolberg)*, 199 B.R. 929, 932-33 (W.D. Mich. 1996)(creditor who waited four months before turning over to trustee assets it had seized from the debtor prepetition had not violated stay since creditor had not acted egregiously or in bad faith but was justifiably protecting its security interest)). *See also In re Zunich*, 88 B.R. 721, 726 (Bankr. W.D. Pa. 1988)(stay violation not willful where creditor had acted in good faith, under mistaken belief that his actions were excepted from stay).

Although the Sixth Circuit Court of Appeals has not ruled

on the issue, the vast majority of the courts, including the Second, Third, Fourth, and Ninth Circuits and a host of lower courts, apply § 362(h) more broadly as the debtors suggest and have imposed liability where the prohibited act was done intentionally, with knowledge of the bankruptcy case. *See Shadduck v. Rodolakis,* 221 B.R. 573, 582 (D. Mass. 1998)(citing *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 227 (9th Cir. 1989)("[Section 362(h)] provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional.")); *Cuffee v. Atl. Bus. & Community Corp. (In re Atl. Bus. & Community Corp.)*, 901 F.2d 325, 329 (3rd Cir. 1990)(adopting definition of willfulness first articulated in *Bloom*); *Crysen/Montenay Energy Co. v. Esselen Assoc., Inc. (In re Crysen/Montenay Energy Co.*), 902 F.2d 1098, 1105 (2nd Cir. 1990) ("[A]ny deliberate act taken in violation of a stay, which the violator knows to be in existence, justifies an award of actual damages."); *TranSouth Financial Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999)("A violation of the automatic stay can be willful when the creditor knew of the stay and violated the stay by an intentional act."); *Diviney v. NationsBank (In re Diviney),* 225 B.R. 762, 774 (B.A.P. 10th

Cir. 1998)(damages awarded upon finding that defendant knew of the automatic stay and its actions which violated the stay were intentional since the defendant's good faith is not relevant to whether the act was willful); *Walker v. Midland Mortgage Co. (In re Medlin)*, 201 B.R. 188, 194 (Bankr. E.D. Tenn. 1996)("A violation of the stay is willful if the creditor deliberately carried out the prohibited act with knowledge of the debtor's bankruptcy case."); *Matthews v. U.S. (In re Matthews)*, 184 B.R. 594, 599 (Bankr. S.D. Ala. 1995)(action is willful if creditor engaged in a deliberate action done in violation of stay with knowledge of bankruptcy); *Hudson v. U.S. (In re Hudson)*, 168 B.R. 449, 453 (Bankr. S.D. Ga. 1994)(willful simply means acting intentionally or deliberately knowing of the bankruptcy petition); *In re Dencklau*, 158 B.R. 796, 799 (Bankr. N.D. Iowa 1993)(willful violation occurs when entity acts deliberately with knowledge of bankruptcy); *Cooper v. Shaw's Express, Inc. (In re Bulldog Trucking, Inc.)*, 1995 WL 613043 at *3 (4th Cir. Oct. 19, 1995)("It is not necessary to a finding of a willful violation of the bankruptcy stay that the Appellants intended to violate § 362....").

As stated by this court on a prior occasion, "the willfulness requirement refers to the deliberateness of the conduct and the knowledge of the bankruptcy filing, not to a

specific intent to violate a court order." *In re Timbs*, 178 B.R. 989, 997 (Bankr. E.D. Tenn. 1994)(citing *Temlock v. Falls Bldg., Ltd. (In re Falls Bldg., Ltd)*, 94 B.R. 471, 481-82 (Bankr. E.D. Tenn. 1988)). In cases where the creditor has acted egregiously, in bad faith, or with the specific intent to violate the stay or in reckless disregard thereof, the courts have generally allowed not only actual damages under § 362(h), but punitive damages as well. *Id*.

The correctness of the majority view that an award of actual damages under § 362(h) does not require a specific intent to violate the stay has been called into question in light of the United States Supreme Court's ruling last year in *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974 (1998), which analyzed the word "willful" in the context of § 523(a)(6) of the Bankruptcy Code. *See In re Hill*, 222 B.R. 119, 123 (Bankr. N.D. Ohio 1998). Section 523(a)(6) bars the discharge of a debt arising from a "willful and malicious injury by the debtor to another entity" or its property. In *Geiger* the Supreme Court held that § 523(a)(6) requires a deliberate or intentional injury, not just a deliberate or intentional act that leads to injury, since the word "willful" modifies the word "injury." *Geiger*, 118 S. Ct. at 977. Applying this same reasoning to § 362(h), the district court in *Jardine's Prof'l Collision Repair, Inc. v.*

Gamble, 232 B.R. 799 (D. Utah 1999), held that because "willful" modifies "violation of a stay" in § 362(h), damages can be awarded only upon a showing that the creditor intentionally or deliberately violated the stay; simply engaging in a deliberate or intentional act with knowledge of the bankruptcy is insufficient. *Id*. at 802.

Other courts, however, including bankruptcy appellate panels in both the Sixth and Tenth Circuits, have rejected this conclusion. *See In re Sharon*, 234 B.R. at 687; *In re Diviney,* 225 B.R. at 774; *In re Robinson*, 228 B.R. 75, 80-81 (Bankr. E.D.N.Y. 1998); *In re Hill*, 222 B.R. 119, 123 (Bankr. N.D. Ohio 1998). As stated by the bankruptcy court in *Robinson*:

> "Willful" in section 523(a)(6), and interpreted in *Geiger*, involves an exception to discharge. Exceptions to discharge are to be narrowly construed. [Citation omitted.] A broader construction of "willful" as used in that section would have been incompatible with that policy. Section 362(h), on the other hand, should be liberally construed to bolster the protections of the automatic stay. [Citation omitted.] Section 362(h) provides a remedy to individual debtors harmed by a willful violation of the automatic stay. If section 362(h) were limited to violators who had specific intent to violate the stay, the deterrent effect of the damages remedy, and the relief it affords wronged debtors, would be compromised inappropriately.

In re Robinson, 228 B.R. at 80 n.5. *See also In re Diviney,* 225 B.R. at 774 ("We think the narrower *Geiger* standard should not be applied to § 362(h) because a party who willfully violates

the automatic stay had the opportunity to seek permission from the bankruptcy court before taking actions that might violate the automatic stay, while determinations of "willful and malicious injury" under § 523(a)(6) are made only after the debtor has acted without the opportunity to obtain a protective ruling from a court before acting."); *In re Hill*, 222 B.R. at 123 (observing that there were compelling reasons for interpreting §§ 362(h) and 523(a)(6) differently: "If a court under section 362(h) ... were to demand proof that the creditor intended to violate the stay ..., these debtor protection provisions would be rendered largely ineffective....").

This court believes the latter to be the better reasoned approach. It is no leap to presume that a creditor intended to violate the stay if it has knowledge of the bankruptcy case and yet deliberately and intentionally engages in acts which violate the stay. To require a debtor to prove, in addition to the creditor's knowledge of the bankruptcy, that the creditor actually intended to violate the stay would in all but the rare case deny the debtor the ability to recover damages under § 362(h). The court notes that the statute provides that in addition to the recovery of actual damages, an individual injured by a willful violation of a stay may recover punitive damages "in appropriate circumstances." If a specific intent to

violate the automatic stay, in other words to purposely act in defiance of federal law, is required simply to recover actual damages under § 362(h), what would be the "appropriate circumstances" which would justify punitive damages? This court can think of none since in the court's view, deliberating acting with the intent to violate federal law is indicative of bad faith and maliciousness.

Unfortunately there is no legislative history to reveal Congress' intent in enacting subsection (h) to § 362 as part of the "Consumer Credit Amendments" to the Bankruptcy Amendments and Federal Judgeship Act of 1984. *See In re Abacus Broadcasting Corp.*, 150 B.R. 925, 928 (Bankr. W.D. Tex. 1993)(citing Pub. L. No. 98-353, 98 Stat. 333, 352, *reprinted in* U.S.C.C.A.N. 333, 352 (1984)). Prior to the enactment of § 362(h), sanctions against willful stay violations were imposed pursuant to the court's contempt powers, so that the standard governing sanctions for contempt also controlled sanctions for violation of the stay. *In re Crysen/Montenay Energy Co.*, 902 F.2d at 1104. Based on these contempt standards, a party guilty of violating the stay would generally not be liable for damages unless it acted maliciously and in bad faith. *Id*. Most courts have concluded that the enactment of subsection (h) was designed to provide a standard less stringent than maliciousness or bad

faith where individual debtors were concerned. *Id*. The court in *Crysen* observed that this less stringent standard "encourages would-be violators to obtain declaratory judgments before seeking to vindicate their interests in violation of an automatic stay, and thereby protects debtors' estates from incurring potentially unnecessary legal expenses in prosecuting stay violations." *Id*. at 1105.

Based on the foregoing, the court concludes that the standard in this court for the imposition of sanctions under § 362(h) for willful stay violations continues to be what the majority of courts have recognized: deliberately engaging in the prohibited act with knowledge of the bankruptcy case. Furthermore, the court finds that the undisputed evidence in this case meets this standard. First Union not only knew of the debtors' bankruptcy case, it also was fully aware of the automatic stay and the ramifications if it was violated, having been sued once before by these same debtors. First Union also deliberately and intentionally undertook actions seeking to collect its debt from the debtors including threatening to foreclose its deed of trust. Notwithstanding the confusion or misimpression on the part of an employee of First Union that the bankruptcy case of the debtors had been dismissed, the fact remains that First Union as an institution knew that the debtors

were still in bankruptcy. "A corporate creditor or law firm that has institutional knowledge of the automatic stay and which violates the automatic stay cannot avoid sanctions pursuant to section 362(h) merely because the persons who carried out the violation were unaware of the existence of the stay." *In re Robinson*, 228 B.R. at 84 n.13. *See also Shadduck,* 221 B.R. at 583-84 (where collection efforts taken because IRS agent believed bankruptcy case had been dismissed, IRS was nevertheless liable for stay violation since other agents knew true state of affairs and this knowledge was imputed to the IRS); *In re Santa Rosa Truck Stop, Inc.*, 74 B.R. 641, 643 (Bankr. N.D. Fla. 1987)(ignorance of a particular agent who acts in violation of the stay is insufficient to shield the IRS who had knowledge of the bankruptcy through another agent).

Similarly, the argument that no sanctions should be imposed because the violation was due to computer or administrative error has been rejected where the creditor had knowledge of the bankruptcy filing. *See U.S. v. Bulson (In re Bulson)*, 117 B.R. 537, 539 (B.A.P. 9th Cir. 1990)("The fact that the IRS might have been mistaken about the status of the case, or believed it had a right to execute on the debtor's property does not make the act of collection non-willful."); *Martine Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.)*, 112 B.R. 526,

532 (S.D.N.Y. 1990), *rev'd on other grounds*, 920 F.2d 183 (2nd Cir. 1990)(error by computer programer resulted in productions of notices to debtor in willful violation of the stay); *In re Shealy*, 90 B.R. 176, 179 (W.D.N.C. 1988)(court rejected creditor's assertion that series of stay violations were innocent clerical error, finding instead that creditor's pattern of inattention demonstrated an intentional disregard of its statutory duty); *but see Hamrick v. U.S. (In re Hamrick)*, 175 B.R. 890, 893 (W.D.N.C. 1994)(stay violation caused by "innocent clerical error" was not willful).

III.

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, the inference to be drawn from the underlying facts contained in the record must be viewed in a light most favorable to the party opposing the motion. *See Schilling v. Jackson Oil Co. (In re Transport Assoc., Inc.),* 171 B.R. 232, 234 (Bankr. W.D. Ky. 1994)(citing *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986)). *See also Street v. J.C. Bradford & Co.,* 886 F.2d 1472 (6th Cir. 1989). No genuine issue of material fact exists and the court concludes that debtors are entitled to summary judgment on the liability aspect of First Union's actions taken in violation of the automatic stay. Accordingly, an order will be entered in accordance with this memorandum opinion granting the debtors' motion for summary judgment in this regard.

FILED: December 3, 1999

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE